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THE MEASURE OF SUCCESS

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# The Notwithstanding Compromise

by Michael Hall



When Conservative MLA Victor Doerksen introduced a private member's bill to amend Alberta's Marriage Act

three years ago, his most articulate opponent was his fellow caucus member Justice Minister David Hancock. Mr. Hancock argued that the bill, which defined marriage as "between a man and a woman" and stated that the definition operates notwithstanding the Charter of Rights and Freedoms, was flawed for three reasons: the definition of marriage is within federal jurisdiction, and the provincial government should not "offend that constitutional custom"; a definition in provincial law would have "no force or effect"; and such a "global" application of the notwithstanding clause would be a potential threat to individuals' rights. Despite his concerns—and his vote against the bill—the amendment was passed.

Three years later, Mr. Hancock has changed his mind. In June, he formally asked the federal government to appeal last spring's historic Ontario and B.C. rulings in favour of same-sex marriage. When they didn't appeal he said that his government could use the notwithstanding clause to avoid recognizing same-sex marriage.

Why this turnaround? It seems that Mr. Hancock has learned how to compromise. Compromise is at the heart of the notwithstanding clause. The inclusion of the clause was a compromise agreed to by Prime Minister Trudeau and the premiers (including Peter Lougheed) when the Charter was being developed in the early eighties. By allowing legislatures to create laws that opt out of the Charter, the clause gives the provincial and federal governments a way to, as Mr. Doerksen put it, "insert their will over the non-elected judiciary" in cases where the rights of indi-

viduals need to be abrogated "for important reasons." The question is, when is it acceptable to compromise individuals' rights?

For Mr. Doerksen and other social conservatives in the Tory caucus, it is acceptable when traditional marriage is at stake. For Mr. Klein, however, the compromise is of a different sort. In 1999, when Mr. Klein annoyed social conservatives by not attempting to use the notwithstanding clause to challenge the *Vriend* decision, he placated them by saying that he would use it to fight same-sex marriage. Mr. Klein has appeared to put his own tolerant attitudes aside on this matter, and instead says he's doing what a majority of Albertans want.

This populist approach to the issue is flawed, at best. The Charter is meant to protect individuals' rights when a governing majority threatens them, so bypassing the Charter to satisfy majority opinion directly contradicts its purpose. Granting rights, such as the right to equal treatment, to gays and lesbians does not diminish the rights of others, so the notwithstanding clause is not justified.

If it had been followed through, this populist approach, though wrong-headed, would at least have shown respect for the citizenry. But Mr. Klein extended his populism only to his peers. Rather than polling Albertans to find out their opinions on same-sex marriage last spring, he polled his caucus. Not only is he willing to deny rights to Albertans, but he is willing to do so simply to calm the social conservatives in his caucus. Our premier has thus transformed the notwithstanding clause—a tool that was designed to allow elected governments to compromise the rights of individuals for the greater good of the citizenry—into a tool for brokering political compromise and keeping the peace in caucus. And he has our justice minister behind him.